Supreme Court, U.S.
FILED
DEC 29 1980
MICHAEL RODAK, JR., CLERK

Con

SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,
Petitioner,
vs.
JAMES JOSEPH DAUGHERTY,
Respondent.

NO. 80 - ~~748~~ 784

MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

COMES NOW, the Respondent, James Joseph Daugherty, by and through his Court Appointed Attorney, William G. Knudsen and moves this Court for an Order authorizing the Respondent to proceed in Forma Pauperis in the above-entitled matter.

This Motion is based upon the records of this cause and the Affidavit filed herein on the _____day of December, 1980.

DATED this 11th day of December, 1980.

Wm. G. Kn

WILLIAM G. KNUDSEN
Attorney for Respondent

Mot. for Leave to Appeal
in Forma Pauperis

LAW OFFICES OF
RICHARD R. STOCKING
ATTORNEY AT LAW
[illegible] SIDNEY AVE.
PORT ORCHARD, WA. [illegible]
TELEPHONE (206) [illegible]

FILED

DEC 29 1980

MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON, Petitioner, vs. JAMES JOSEPH DAUGHERTY, Respondent.	NO. 80 - ~~748~~ 784 AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, JAMES JOSEPH DAUGHERTY, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

Response to Petition for Writ of Certiorari filed by the State of Washington in this matter.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed:

Answer: No; Date of last employment was October 1, 1980 and I was making approximatley $850.00 net per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment

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PORT ORCHARD, WA. 98366
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or in the form of rent payments, interest, dividends, or other source?

Answer: I received approximately $850.00 net per month income from employment at the Naval Undersea Warfare Engineering Station in Keyport, Washington, until I was laid-off October 1, 1980 and have been unemployed since that time.

3. Do you own any cash or checking or savings accounts?

Answer: None

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: 1955 Chevrolet Pick-up, approx. value-$150.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: My wife, Terri Daugherty and my daughter, Cindy Daugherty.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

James J. Daugherty

SUBSCRIBED and SWORN to before me this 23rd day of December, 1980.

Wm. G. Kl

seal

NOTARY PUBLIC in and for the State of Washington, residing at

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUDGE

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RICHARD R. STOCKING
ATTORNEY AT LAW
[illegible]
PORT ORCHARD, WA. [illegible]
TELEPHONE (206) [illegible]

FILED
IN OPEN COURT
KITSAP COUNTY
NOV 14 1980
ROBERT L. FREUDENSTEIN, Clerk
By _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
JAMES J. DAUGHERTY,
Defendant.

NO. C3204

ORDER OF INDIGENCY AND AUTHORIZING EXPENDITURE OF PUBLIC FUNDS ON COSTS OF APPEAL

THIS MATTER coming on regularly to be heard before the under-signed Judge of the above-entitled Court, upon the Motion of William G. Knudsen, Court Appointed Attorney for the Defendant herein, for an Order declaring the said Defendant to be an indigent person and authorizing him to proceed in Forma Pauperis and further authorizing the expenditure of public funds for the payments of fees, costs and expenses necessarily incurrable upon appeal by the Defendant of the Judgment entered against him herein on the 14th day of July, 1977, and the Court being fully advised in the premises finds said Defendant to be an indigent person, wholly without funds necessary to pay the costs and expenses which may be necessarily incurred on appeal and that the expenditure of public funds for such costs, fees and expenses should be authorized, now, therefore, it is hereby

ORDERED and ADJUDGED that the Defendant, James J. Daugherty, is an indigent person and that he be and hereby is authorized to proceed in Forma Pauperis, and, it is further,

ORDERED that the expenditure of public funds as may

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be reasonable and necessarily incurred in the prosecution of an appeal from the Washington State Supreme Court to the United States Supreme Court and the same is hereby authorized, and, it is further,

ORDERED that WILLIAM G. KNUDSEN be appointed counsel on appeal in this matter.

DONE IN OPEN COURT this 14th day of November, 1980.

JUDGE

PRESENTED BY:

Wm. G. Knudsen

WILLIAM G. KNUDSEN
Attorney for Defendant

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE AND HAVING BEEN FILED Nov 14, 1980
ATTEST November 14 80
ROBERT L FREUDENSTEIN
COUNTY CLERK AND CLERK OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF KITSAP
BY Shirley Hayward, DEPUTY

Ord. of Indig. & Auth. Espend. of Public Funds on Costs of Appeal

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ATTORNEY AT LAW
000 SIDNEY AVE.
PORT ORCHARD, WA. 00000
TELEPHONE (000) 000-0000

FILED
IN OPEN COURT
KITSAP COUNTY
NOV 14 1980
ROBERT L. FREUDENSTEIN, Clerk
By _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
JAMES J. DAUGHERTY,
Defendant.

NO. C3204
ORDER APPOINTING COUNSEL

COMES NOW, the Defendant in this cause, having appeared in Open Court to request the appointment of counsel to represent him on Appeal herein and the Defendant having been interrogated by the Court and having been found to be without means with which to employ counsel and being desirous of having such representation; now, therefore,

IT IS ORDERED that, WILLIAM G. KNUDSEN, a member of the bar, be and hereby is appointed to represent the Defendant, James J. Daugherty, throughout these proceedings.

DONE IN OPEN COURT this 14th day of November, 1980.

JUDGE/COURT COMMISSIONER

PRESENTED BY:

Wm G. K

WILLIAM G. KNUDSEN
Attorney for Defendant

Ord. Appointing Counsel

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE
SAME HAVING BEEN FILED November 14, 1980
ATTEST December 4 19 80
COUNTY CLERK AND CLERK OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF KITSAP
BY Janice O'Dell DEPUTY

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FILED
DEC 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

STATE OF WASHINGTON, PETITIONER

V.

JAMES JOSEPH DAUGHERTY, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM G. KNUDSEN
Law Offices of
Richard R. Stocking
608 Sidney
Port Orchard, WA 98366
Telephone: (206) 876-3360

Issues Raised by

Questions Presented For Review

A. Should this Court review by Writ of Certiorari factual determinations made by the Washington State Court of Appeals and the Washington State Supreme Court where each Appellate Court has independently reviewed the record herein and has made factual determinations adverse to the position asserted by the State of Washington, the Petitioner herein?

B. Should the Court in this case review by Writ of Certiorari Petitioner's argument that the Exclusionary Rule be abandoned when that rule has been the law in the State of Washington for the past 58 years and was not presented by Petitioner for consideration in either of Washington's two Appellate Courts nor by way of Motion for Reconsideration?

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Opinions Below

The opinion of which the Petitioner seeks review is State v. Daugherty, 94 Wn.2d 263, _____ P.2d _____ (1980). A copy of this opinion is appended to the State of Washington's Petition denoted Appendix A. The opinion of the intermediate Court is State v. Daugherty, 22 Wn.App. 442, 591 P.2d 801 (1979). A copy of this opinion is appended to the State of Washington's Petition and is denoted Appendix B.

Jurisdictional Statement

The judgment of the State of Washington Supreme Court was entered on September 11, 1980, however the Petitioner did not file a Motion to Reconsider as provided by Washington State Rules of Appellate Procedure, Rule 12-4A.

Constitutional Provisions Involved

U.S. Const. Amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Statement of The Case

Petitioner has set forth a summary of facts giving rise to this controversy. In addition thereto, each of the Appellate Courts' decisions of the State of Washington discuss at length the evidence presented at the suppression hearing with the following pertinent findings which have not been included in Petitioner's statement of the case.

1. The officer who observed what appeared to be a safe made his observation from a Constitutionally protected area. State v. Daugherty, 94 Wn.2d 263, _____P.2d _____(1980). At page 269.

2. The intrusion into the protected area was not justified by the "exigent circumstance" of conducting a limited search to assure the safety of the officers from an unknown accomplice.

a. There was no evidence that more than one person was involved. At p. 270.

b. There were no "specific and articulable facts" to support the belief that there was more than one person involved. At p. 270.

c. There was no reasonable basis for believing that if in fact there was an accomplice

he was present when the police arrived at the Respondent's residence due to the difference in time and place. At p. 270.

d. The officer's own testimony and conduct demonstrated they intruded onto the protected area not as a safety precaution but to search for evidence. At p. 271.

e. If Officer Patterson really believed there was some danger he would not have taken unarmed and inexperienced officers as protection against the possibility of being endangered by a hidden accomplice. At p. 271.

3. The officer's entry into the area behind the Respondent's truck was in fact a pretext to conduct an exploratory search of it and the garage in the hope that they would discover evidence of the burglary. The discovery therefore was not inadvertant. At p. 271 and 272.

Argument

A. The State seems to concede in this argument that the area from which the safe was viewed was a Constitutionally protected area, as found by the Washington Supreme Court, and argues

only that the intrusion was justified.

Both the Washington Supreme Court and Court of Appeals found that the officers intruded into a Constitutionally protected area and that no exigent circumstances justified the intrusion under Terry v. Ohio 392 U.S. 1, 88 S.Ct 1868, 20 L.Ed. 2d 889 (1968).

B. The State argues that the safe was properly seized under the "plain view" doctrine.

Here again both the Washington Supreme Court and Court of Appeals found that the intrustion had no prior justification, an element of the "plain view" doctrine enunciated in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Where the Court of Appeals assumed for the purpose of its opinion that the discovery of the evidence was "inadvertent" the second element of the "plain view" doctrine under Coolidge, State v. Daugherty, 22 Wn.App. 442, 591, P.2d 801 (1979) at p. 444-445, the Washington Supreme Court specifically found that the discovery was not "inadvertent" as the testimony of Officer Patterson clearly evidenced a purpose to go to the Daugherty residence to search for evidence

of the burglary they were investigating. State v. Daugherty, 94 Wn.2d 263 at p. 271-272

As there was no search warrant sought or obtained in this case and the only possible exception to the warrant requirement would be the "plain view" doctrine, and the State having failed to meet this burden of proof of two of the three essential elements of the "plain view" doctrine the Washington State Supreme Court held that this exception to the warrant requirement was not met.

The State also alleges in its Petition that this Court should accept review to resolve discrepancies in the interpretation of the Coolidge case by the various intermediate Appellate Courts of the State of Washington.

Resolution of such discrepancies is the function of the Washington Supreme Court and although that issue was raised during the course of this case the Washington State Supreme Court determined that the case could be decided without reaching that issue. The State was entitled to bring a Motion to Reconsider and specifically request a ruling, however the State did not exercise this opportunity to clarify the issue

under applicable Washington Court rules and the judgment of the Washington State Supreme Court has become final.

C. Finally the State argues that the Exclusionary Rule should be abandoned.

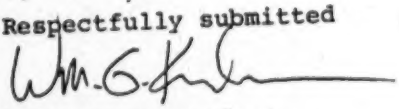
During the course of hearings on this case in both the Washington Court of Appeals and the Washington State Supreme Court the State not once raised this issue for consideration. While the Exclusionary Rule was first made obligatory in State Court criminal proceedings by Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, (1961), the State of Washington adopted this rule as law years before the Mapp decision.

In State v. Gibbons, 118 Wash 171, 203, Pac 390 (1922) the Washington State Supreme Court first adopted the Exclusionary Rule as the law in the State of Washington. Since 1922 the Gibbons decision and the decisions following it have formed the foundation for the suppression in State criminal prosecutions of evidence illegally obtained.

Conclusion

The Washington Supreme Court has clearly decided this case in accord with the decisions of this Court and Respondent respectfully requests that the State of Washington's Petition for Writ of Certiorari be denied.

Respectfully submitted



William G. Knudsen
Attorney for Respondent